Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 04–1–2009(W) OF 2009

ARIFIN ZAKARIA CJ (MALAYA), MOHD GHAZALI AND RAUS SHARIF FCJJ

12 MAY 2010

Administrative Law — Judicial remedies — Judicial review — Grounds for — Whether court may scrutinise decision of inferior tribunal for process and substance — Decision of R Rama Chandran v Industrial Court of Malaysia & Anor, scope and extent of

Administrative Law — Judicial review — Application for — Decision of inferior tribunal unsupported by facts — Decision made after considering irrelevant matters and ignoring relevant matters — Whether such decision amenable to judicial review

Labour Law — Employment — Dismissal — Condonation — Dismissal of employee on ground of tardiness — Employee previously warned by employer concerning tardiness — Whether doctrine of condonation applicable — Whether Industrial Court erred in finding condonation

Labour Law — Industrial Court — Award — Jurisdictional errors — Acting on unpleaded issue — Finding made in absence of positive proof — Misdirection on standard of proof — Failure to consider relevant matters — Consideration of irrelevant matters — Whether award amenable to judicial review — Whether award ought to be quashed by High Court acting on judicial review

Labour Law — Industrial Court — Duty of court — Duty to act according to equity, good conscience and substantial merits of case without regard to technicalities and legal form — Extent of duty — Whether Industrial Court free to disregard basic rules of pleadings in execution of duty — Whether Industrial Court free to disregard the Industrial Court Rules in execution of duty — Industrial Relations Act 1967 s 30(5) — Industrial Court Rules 1967

Labour Law — Industrial Court — Finding of fact — Issue not pleaded in claimant's statement of case — Finding made based on unpleaded issue — Whether

Industrial Court free to consider issues not raised in pleadings — Whether s 30(5) of the Industrial Relations Act 1967 could save claimant's defective pleadings — Industrial Relations Act 1967 s 30(5)

The appellant was an employee of the respondent. She was dismissed after a domestic enquiry found her guilty on charges related to insubordination, tardiness, malingering and failure to promptly submit medical leave chits. The Industrial Court found that she had been dismissed without just cause or excuse on, inter alia, the basis that there had been a 'possibility of victimisation'. It thus awarded her compensation in lieu of backwages. The High Court quashed the award and the Court of Appeal dismissed the appellant's appeal with costs. The appellant obtained leave to appeal to the Federal Court. Two questions were formulated for the court's determination, to wit: (i) what is the function of the court in an application for judicial review and what is the correct test to be applied in reviewing findings of fact made by the Industrial Court; and (ii) is the Industrial Court subject to a more stringent test in relation to its pleadings than the civil courts pursuant to s 30(5) of the Industrial Relations Act 1967 ('the Act').

Held, dismissing the appeal with costs:

(1) Historically, judicial review was only concerned with the decision making process where the impugned decision was flawed on the ground of procedural impropriety. However the decision in *R Rama Chandran* held that the decision of an inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permit the courts to scrutinise the decision not only for process but also for substance. It allows the courts to go into the merits of the matter. The distinction between review and appeal no longer holds (see para 15); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 followed.

(2) The scope and ambit of *R Rama Chandran* has been clearly explained, clarified and limited. It is now established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court have been arrived at by taking into consideration irrelevant matters, and have failed to take relevant matters into consideration, such findings are amenable to judicial review (see para 19); *Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 MLJ 789 (FC) referred; *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288 (FC) referred; *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1 referred; *National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd* [2000] 2 MLJ 144 referred; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 referred; *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97 referred.

(3) The Industrial Court committed jurisdictional errors when finding the 'possibility of victimisation', in the absence of positive proof. It also misdirected on the standard of proof by reference to a 'possibility' instead of a balance of probabilities. The Industrial Court failed to consider relevant matters, such as instances of the appellant's insubordination and recalcitrance. Instead, the court took into account irrelevant matters such as the fact that the respondent had not taken action against another employee over similar misconduct (see paras 21–23).

(4) The Industrial Court erred in applying the doctrine of condonation when it held that the respondent had condoned the appellant's tardiness. The appellant had in fact been warned about such conduct previously (see para 24).

(5) In view of the multiple errors by the Industrial Court, the High Court was correct in quashing the Industrial Court's decision and the Court of Appeal was correct in upholding the High Court's decision (see para 25).

(6) The Industrial Relations Act 1967 could not be used to override or circumvent the basic rules of pleadings. The Industrial Court, like the civil courts must confine itself to the four corners of the pleadings. Pleadings in the Industrial Court are as important as in the civil courts. The claimant must plead his case and the Industrial Court must decide on the claimant's pleaded case. This is important in order to prevent the element of surprise and provide room for the other party to adduce evidence once the fact or an issue is pleaded. The Industrial Court's duty to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal form under s 30(5) of the Act, does not give the Industrial Court the right to ignore the Industrial Court Rules 1967 made under the principal Act (see paras 28–29); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 followed.

(7) In the instant case, the appellant had failed to plead victimisation in her statement of case. It was not a ground advanced by the appellant. As such the Industrial Court could not act on a ground which was not advanced in a pleaded case. Section 30(5) of the Act could not rescue the appellant's case (see para 31).

(8) The Federal Court would answer the questions posed in the following manner. In respect of the first question: (i) where the facts do not support the conclusion arrived by the Industrial Court, or where the findings of the Industrial Court have been arrived at by taking into consideration irrelevant matters, and has failed to take relevant matters into consideration, such findings are always amendable to judicial review. In respect of the second question: pleadings in the Industrial Court are as

important as in the civil courts. Section 30(5) of the Act could not be used to override or circumvent the basic rules of pleading (see para 32(a)–(b)).

[Bahasa Malaysia summary

Perayu merupakan pekerja responden. Dia telah dibuang kerja selepas satu siasatan dalaman mendapatinya bersalah terhadap pertuduhan berkaitan dengan keingkaran, kelewatan, tipu sakit dan kegagalan untuk mengemukakan surat cuti sakit dengan segera. Mahkamah Perusahaan mendapati bahawa dia telah dibuang tanpa alasan atau sebab yang adil atas, antara lain, dasar bahawa terdapat 'possibility of victimisation'. Ia oleh itu mengawardkan pampasan kepadanya sebagai ganti gaji kebelakang. Mahkamah Tinggi membatalkan award tersebut dan Mahkamah Rayuan menolak rayuan perayu dengan kos. Perayu memperoleh kebenaran untuk merayu daripada Mahkamah Persekutuan. Dua soalan dikemukakan untuk diputuskan oleh mahkamah, iaitu: (i) apakah fungsi mahkamah di dalam permohonan untuk semakan kehakiman dan apakah ujian yang betul untuk diaplikasi dalam menyemak penemuan fakta oleh Mahkamah Perusahaan: dan (ii) sama ada Mahkamah Perusahaan tertakluk kepada ujian yang lebih ketat berkaitan dengan plidingnya daripada mahkamah sivil berikutan s 30(5) Akta Perhubungan Perusahaan 1967 ('Akta tersebut').

Diputuskan, menolak rayuan dengan kos:

(1) Dari segi sejarah, semakan kehakiman hanya berkaitan dengan proses membuat keputusan di mana keputusan yang dipersoalkan adalah salah atas alasan ketidakwajaran prosedur. Walau bagaimanapun, keputusan di dalam kes *R Rama Chandran* memutuskan bahawa keputusan tribunal yang lebih rendah boleh disemak atas alasan 'illegality', 'irrationality' dan kemungkinan 'proportionality' yang membenarkan mahkamah meneliti keputusan tersebut bukan hanya untuk proses tetapi juga untuk kandungan. Ia membenarkan mahkamah menentukan merit perkara tersebut. Perbezaan di antara semakan dan rayuan tidak bertahan lagi (lihat perenggan 15); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 diikut.

(2) Skop dan rangkuman kes *R Rama Chandran* telah dijelaskan dengan rapi, diterangkan dan terhad. Ia kini adalah matan bahawa di mana fakta tidak menyokong keputusan yang dibuat oleh Mahkamah Perusahaan, atau di mana penemuan Mahkamah Perusahaan telah dicapai dengan mengambil kira perkara-perkara yang tidak relevan, dan telah gagal mengambil kira perkara-perkara yang relevan, penemuan sedemikian boleh disemak secara kehakiman (lihat perenggan 19); *Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 MLJ 789 (MP) dirujuk; *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288 (MP) dirujuk; *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ

1 dirujuk; *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144 dirujuk; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 dirujuk; *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97 dirujuk.

(3) Mahkamah Perusahaan telah melakukan kekhilafan dari segi bidang kuasa apabila membuat penemuan 'possibility of victimisation', dalam ketiadaan bukti positif. Ia juga telah tersalah arah atas standard pembuktian dengan rujukan kepada 'possibility' dan bukan imbangan kebarangkalian. Mahkamah Perusahaan gagal untuk mempertimbangkan perkara-perkara yang relevan, seperti perkara-perkara keingkaran dan kedegilan perayu. Sebaliknya, mahkamah mengambil kira perkara-perkara yang tidak relevan seperti fakta bahawa responden tidak mengambil tindakan terhadap seorang lagi pekerja bagi salah laku yang serupa (lihat perenggan 21–23).

(4) Mahkamah Perusahaan khilaf dalam mengaplikasi doktrin membiarkan sesuatu apabila ia memutuskan bahawa responden membiarkan kelewatan perayu. Perayu sebenarnya telah diberi amaran mengenai tindakan sedemikian sebelum ini (lihat perenggan 24).

(5) Melihat kepada kekhilafan berganda oleh Mahkamah Perusahaan, Mahkamah Tinggi adalah betul dalam membatalkan keputusan Mahkamah Perusahaan dan Mahkamah Rayuan adalah betul dalam mengesahkan keputusan Mahkamah Tinggi (lihat perenggan 25).

(6) Akta tersebut tidak boleh digunakan untuk mengatasi atau memintasi peratusan asas pliding. Mahkamah Perusahaan, seperti mahkamah sivil seharusnya mengehadkan diri kepada lingkungan pliding. Pliding di dalam Mahkamah Perusahaan adalah sama penting seperti di mahkamah sivil. Penuntut mesti memplid kesnya dan Mahkamah Perusahaan mesti memutuskan atas kes penuntut yang diplidkan. Ini adalah penting untuk menghalang elemen mengejutkan dan memberikan ruang kepada pihak yang satu lagi untuk mengemukakan keterangan setelah fakta atau isu diplidkan. Kewajipan Mahkamah Perusahaan untuk bertindak menurut ekuiti, hati nurani dan merit kes yang substansial tanpa perhatian kepada kesulitan teknikal dan bentuk undang-undang di bawah s 30(5) Akta, tidak memberikan Mahkamah Perusahaan hak untuk tidak mengendahkan Peraturan Mahkamah Perusahaan 1967 yang dibuat di bawah Akta induk (lihat perenggan 28–29); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 diikut.

(7) Di dalam kes ini, perayu telah gagal memplid pemangsaan di dalam penyata kesnya. Ia bukan alasan yang dikemukakan oleh perayu. Oleh itu Mahkamah Perusahaan tidak boleh bertindak atas alasan yang tidak dikemukakan di dalam sesuatu kes yang diplid. Seksyen 30(5) Akta tidak boleh menyelamatkan kes perayu (lihat perenggan 31).

(8) Mahkamah Perusahaan akan menjawab soalan yang dikemukakan di dalam cara yang berikut. Berkaitan dengan soalan pertama: (i) di mana fakta tidak menyokong keputusan yang dicapai oleh Mahkamah Perusahaan, atau di mana penemuan oleh Mahkamah Perusahaan telah dicapai dengan mengambil kira perkara-perkara yang tidak relevan, dan telah gagal untuk mengambil kira perkara-perkara yang relevan, penemuan sedemikian adalah selalunya boleh disemak secara kehakiman. Berkaitan dengan soalan kedua: pliding di Mahkamah Perusahaan adalah sama penting seperti di mahkamah sivil. Seksyen 30(5) Akta tersebut tidak boleh digunakan untuk mengatasi atau memintasi peraturan asas pliding (lihat perenggan 32(a)–(b)).]

Notes

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 191–197.

For cases on award, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1411–1476.

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 948–1000.

For cases on finding of fact, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1513–1516.

For cases on Industrial Court generally, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1407–1630.

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 164–189.

Cases referred to

Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal [2001] 4 MLJ 97; [2001] 3 CLJ 9, CA (refd)

Kumpulan Perangsang Selangor Bhd v Zaid Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11, SC (refd)

National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam [2000] 2 MLJ 144; [2000] 1 CLJ 681, CA (refd)

Petroliam National Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)

Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2001] 1 CLJ 9, CA (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147; [1997] 1 AMR 433, FC (folld)

Swedish Motor Assemblies Sdn Bhd v Haji Md Ison bin Baba [1998] 2 MLJ 372; [1998] 3 CLJ 288, CA (refd)

Tanjong Jara Beach Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia [2004] 4 CLJ 657, FC (refd)

William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1; [1997] 3 CLJ 235, CA (refd)

Legislation referred to

Industrial Court Rules 1967 rr 9, 9(3)
Industrial Relations Act 1967 s 30(5)

Appeal from: Civil Appeal No W-04–157 of 2002 (Court of Appeal, Putrajaya)

Ambiga Sreenevasan (Shireen Selvaratnam with her) (Sreenevasan) for the appellant.
N Sivabalah (Suganthi Singam with him) (Shearn Delamore & Co) for the respondent.

Raus Sharif FCJ:

INTRODUCTION

[1] This is an appeal filed by the appellant against the decision of the Court of Appeal on 17 September 2008 which upheld the decision of the High Court in quashing the award of the Industrial Court dated 29 September 2001.

BACKGROUND FACTS

[2] The relevant facts are as follows. The appellant commenced employment with Hotel Excelsior (M) Sdn Bhd ('the respondent') on 28 September 1993 as a junior receptionist. On 27 August 1984, she was promoted as a senior receptionist and subsequently as front office executive with effect from 16 May 1991.

[3] On 1 March 1997, the appellant was transferred to the Food & Beverage (F&B) Department as an executive. The appellant protested to the transfer on the ground that she had no experience or knowledge of food and beverage. However, she reported for duty under protest.

[4] By a letter dated 11 March 1997, the respondent issued a job specification to the appellant which include, inter alia, the following:

> You are to ensure that you and your staff are well groomed before reporting for duty. Personal grooming is of utmost importance and all staff should be in well dressed attire.

[5] Another letter was issued on 12 March 1997 to the appellant requiring her to wear uniform, and, for that purpose, the respondent gave her two skirts, one jacket and one white blouse. The appellant protested to being the only executive required to wear a uniform.

[6] On 21 March 1997, the respondent provided the appellant a bow-tie to be worn as part of her uniform. Again the appellant raised the fact that she was the only executive being made to wear a uniform and a bow-tie.

[7] On 17 August 1997, the appellant was suspended pending a domestic inquiry into five charges levelled against her. The five charges read as follows:

Charge No 1

> That you between 6 August 1997 and 10 August 1997 in total defiance of the instructions and a warning issued on 20 March 1997 by your Superior, Mr Vincent Nonis, you refused to wear the attire namely a collared white shirt and bow-tie.

Charge No 2

> That you on the dates and times shown in annexure (see enclosed annexure) did wilfully and without lawful excuse habitually reported late for work at Hotel Excelsior in spite of numerous warnings issued to you.

Charge No 3

> That you on the following dates and times as set in the annexure (see enclosed annexure) conveniently procured and obtained medical leaves on several occasions which occasions were immediately following day-off, annual leave or public holidays.

Charge No 4

> That you on the following dates and times set out in the annexure (see enclosed annexure) failed to submit your medical chits of the medical practitioners promptly to your immediate superior as was required of you on the said occasions you took medical leave.

Charge No 5

> That you on the following dates and times as set out in the annexure (see enclosed annexure) have failed to inform your immediate Superior promptly that you have taken medical leave so as to enable your immediate Superior to make alternative arrangements for the smooth operation of business at the Dulang Coffee House, Hotel Excelsior.

[8] One of the charges ie charge No 3 was subsequently dropped. However, she was found guilty of the four remaining charges and consequently she was dismissed with effect from 28 August 1997.

[9] The dismissal was referred to the Industrial Court which found that the appellant had been dismissed without just cause or excuse. The respondent was ordered to pay backwages in the sum of RM42,304.50 and compensation in lieu of reinstatement for the sum of RM21,567.

[10] The Industrial Court's award however, was quashed by the High Court by way of an order of certiorari. The High Court held that the Industrial Court had erred in law and/or had acted in excess of its jurisdiction by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration, and had failed to consider the pleadings of the parties, and had misdirected itself by asking the wrong question in handing down its award.

[11] Aggrieved by the decision of the High Court, the appellant appealed to the Court of Appeal. The Court of Appeal found the High Court had correctly quashed the Industrial Court award and accordingly dismissed the appellant's appeal with costs. The appellant then applied for leave to appeal to this court. It was granted on 24 March 2009.

QUESTIONS OF LAW

[12] Two questions of law were formulated for our determination:

(a) What is the function of the court in an application for judicial review and what is the correct test to be applied in reviewing findings of fact made by the Industrial Court.

(b) Whether the Court of Appeal was correct in law in holding that the Industrial Court as a specialised domain of industrial jurisprudence is subject to a more stringent test in relation to its pleadings and procedure than the civil courts in the face of s 30(5) of the Industrial Relations Act 1967.

The first question

What is the function of the courts in application for judicial review and what is the correct test to be applied in reviewing findings of fact made by the Industrial Court

[13] Learned counsel for the appellant submitted that in view of the systematic attempts to explain the ambit of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147; [1997] 1 AMR 433 (*'Rama Chandran'*), it is now necessary to revisit and restate the law in this area. She submitted that the decision of the inferior tribunal can be scrutinised for the process and substance. However, she was quick to point out

that where the findings of facts by the inferior tribunal are based on credibility of witnesses, those findings of fact should not be reviewed. Applying this preposition of law to the instant case, she submitted that the High Court had erred in reversing the findings of facts made by the Industrial Court, which the former is not entitled to do so.

[14] In response, learned counsel for the respondent contended that the first question as framed need not be answered, as the law on this issue is well settled. Learned counsel went on to submit that where the facts do not support the conclusion arrived by the Industrial Court as what had happened in this case, the High Court can in its review of such finding of facts overrides or interferes with the conclusion by the Industrial Court. Learned counsel then highlighted to us the multiple errors of law and fact committed by the Industrial Court which warranted the issuance of the order of certiorari.

[15] We find that there is merit on the submission advanced by learned counsel for the respondent. Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.

[16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the courts' liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 after affirming the *Rama Chandran* decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate.

[17] The Federal Court, in *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.

[18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235; *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; [2000] 1 CLJ 681; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9; *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97; [2001] 3 CLJ 9). However, there are exceptions to this restrictive principle where:

(a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality; or

(b) there is no evidence to support the conclusion reached.

(See *Swedish Motor Assemblies Sdn Bhd v Haji Md Ison bin Baba* [1998] 2 MLJ 372; [1998] 3 CLJ 288).

[19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review.

[20] That was what had exactly happened in this case. The Industrial Court whilst recognising that there was no positive proof of victimisation nevertheless went on to conclude that there was victimisation. The learned chairman of the Industrial Court held:

> The manner in which the charges have been framed against the claimant gives the impression that the claimant has been victimised. This court of course cannot uphold a plea of victimisation in the absence of positive proof but as a court of social justice it is bound to give due consideration to the possibility of victimisation and should any doubt arise it should give the benefit of the doubt to the employee after taking into consideration of the whole of evidence and the particular circumstances surrounding the case.

[21] The High Court as well as the Court of Appeal found that there was no evidence to support the issue of victimisation. Justice Low Hop Bing JCA held that the 'Industrial Court had gone on a frolic of its own' in finding that the appellant had been victimised. He further held that it was manifestly wrong for the Industrial Court to proceed to embark on 'the possibility of victimisation' when it should have been concerned with probabilities ie on the balance of probabilities. We agree with Justice Low Hop Bing JCA. Clearly the Industrial

Court has committed jurisdictional errors when finding the possibility of victimisation in the absence of positive proof and misdirecting on the standard of proof by reference to possibility instead of a balance of probabilities.

[22] Basically, this is a case of an employee (the applicant) who refused to follow instructions. She refused to wear a white collared shirt and bow-tie. She wilfully and without lawful excuse habitually reported late to work in spite of numerous warnings issued to her. She failed to submit medical certificate of the medical practitioner promptly as was requested of her on the occasion she took medical leave. She also failed to inform her immediate superior whenever she have taken medical leave so as to enable her immediate superior to make alternative arrangements for the smooth operation of the respondent's business. In short she was a recalcitrant employee.

[23] All the above are the relevant matters which the Industrial Court had failed to take into consideration. Instead, it took into consideration other irrelevant matters. A clear example was when it took into account the fact that the respondent's action in not taking action against another employee for a similar misconduct amounted to a display of double standard. With utmost respect, such conclusion is a clear error. As rightly pointed out by the learned High Court judge that such consideration was irrelevant as it was not for the appellant to question why the respondent as the employer should take disciplinary action against her and not another.

[24] Another error on the part of the Industrial Court was when it concluded that the respondent had condoned the appellant's conduct in relation to her coming to work late. Clearly the Industrial Court has misapplied the doctrine of condonation. The doctrine of condonation would only come into play if the respondent had been fully aware of the applicant's late coming and nonetheless elected to do nothing about it. However, the respondent had adduced evidence that the appellant had been warned about such conduct previously.

[25] In light of the multiple errors on the part of the Industrial Court, the High Court judge was correct in quashing the decision of the Industrial Court. For the same reason, the Court of Appeal did not exceed its role when it upheld the decision of the High Court in the review of the High Court's exercise of its supervisory jurisdiction.

The second question

Whether the Court of Appeal was correct in law in holding that the Industrial Court as a specialised domain of the industrial jurisprudence is subject to a mere stringent test in relation to its pleadings and procedure than the civil courts in the face of s 30(5) of the Industrial Relations Act 1967

[26] Learned counsel for the appellant submitted that on the face of s 30(5)

of the Industrial Relations Act 1967 ('the Act') the practice and procedure governing the Industrial Court rules relating to procedure should be less stringent than that applicable in the civil courts. Section 30(5) reads as follows:

> The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

Thus, it was submitted that even though victimisation was not pleaded this should not be invoked to defeat the claim made by the appellant. It was further submitted that the Industrial Court must be allowed to conduct its proceedings with the necessary flexibility to arrive at a decision, so long as it has given special regard to the substantial merits of the case and decides according to equity and good conscience.

[27] Learned counsel for the respondent responded by stating that s 30(5) of the Act could not be used to override or circumvent the basic rules of pleading. He submitted that the Industrial Court must confine itself to the four corners of the pleadings place before it. The Federal Court case in *Rama Chandran* was cited in support.

[28] There is no doubt that the underlying objectives and purposes of the Act is to ensure social justice to both employers and employees and to advance the progress of industry by bringing harmony and cordial relationship between the parties and to eradicate unfair labour practices, to protect workmen against victimisation by employers and to ensure termination of industrial disputes in a peaceful manner (see *Tanjong Jara Beach Hotel Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia* [2004] 4 CLJ 657). However, as rightly pointed out by learned counsel for the respondent, s 30(5) of the Act cannot be used to override or circumvent the basic rules of pleading. The Industrial Court, like the civil courts must confine itself to the four corners of the pleading. This had been held to be so by this court in *Rama Chandran* which are as follows:

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues.

[29] There is no reason to depart from the above view. Pleadings in the Industrial Court are as important as in the civil courts. The appellant must plead its case and the Industrial Court must decide on the appellant's pleaded case. This is important in order to prevent element of surprise and provide room for the other party to adduce evidence once the fact or an issue is pleaded. Thus, the Industrial Court's duty, to act according to equity, good conscience and substantial merits of the case without regard to technicalities and legal

form under s 30(5), does not give the Industrial Court the right to ignore the Industrial Court Rules 1967 made under the principle Act. Rule 9 provides as follows:

> Statement of Case
>
> (1) Upon a case being brought before the Court, the Registrar shall immediately serve notice in Form H on one or other of the parties as the President shall direct to submit to the Court a Statement of Case.

[30] Rule 9(3) specifically prescribes the contents of a statement of case. It reads:

> (3) Such Statement of Case shall be confined to the issues which are included in the Case referred to the Court by the Minister or in the matter required to be determined by the Court under the provisions of the Act and shall contain:
>
> (a) a statement of all relevant facts and arguments;
>
> (b) particulars of decisions prayed for;
>
> (c) an endorsement of the name of the first party and of the first party and of his address for service; and
>
> (d) as appendix or attachment, a bundle of all relevant documents relating to the case.

[31] The Court of Appeal has reproduced the applicant's statement of case in full in its judgment and found that the issue of victimisation was never pleaded. From the statement of case reproduced there is no doubt that the issue of victimisation was never pleaded. It was not a ground advanced by the appellant. As such the Industrial Court cannot act on a ground which was not advanced in a pleaded case. Section 30(5) of the Act cannot rescue the appellant's case.

CONCLUSION

[32] At the end of it, we would answer the questions posed to us as follows:

(a) The answer to the first question is that where the facts do not support the conclusion arrived by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review.

(b) As to the second question, our answer is that pleadings in the Industrial Court are as important as in the civil courts. Section 30(5) of the Act could not be used to override or circumvent the basic rules of pleading.

[33] The appeal is accordingly dismissed with costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon